Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

LARRY HOOVER, TIRENZY WILSON, GREGORY SHELL, JERRY STRAWHORN, ADRIAN BRADD, DARRELL BRANCH, ANDREW HOWARD, and WILLIAM EDWARDS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether pursuant to 18 U.S.C. § 2518(3), a federal district court judge in the Northern District of Illinois can authorize electronic eavesdropping in the Southern District of Illinois?

2. Whether the government can fulfill the requirement of providing a satisfactory explanation for its admitted failure to timely seal tape recordings obtained pursuant to Title III by providing, on appeal, for the first time an explanation which has no record support?

A. This Court should grant the Petition for Certiorari because the Seventh Circuit's decision excusing an admitted 34-day delay in sealing the Title III tapes without providing a satisfactory explanation directly contravenes the holding of the Court in *United States v. Ojeda-Rios*, 495 U.S. 257, 265 (1990).

3. Whether the Fourth Amendment and 18 U.S.C. § 2510(2) protects an Illinois prisoner from being tape recorded while conversing with a visitor, absent consent of any participant in the conversation?

4. The petitioners are entitled to a new trial because the district court refused to instruct the jury that in order to convict the petitioners for violation of 18 U.S.C. § 848, the jurors must unanimously agree which three or more federal narcotics offenses each petitioner committed that constituted a continuing series of offenses.

A. The petitioners are entitled to a new trial because the district court failed to instruct the jury that in order to convict the petitioners for violation of 18 U.S.C. § 848, the jurors must unanimously agree that each petitioner obtained substantial income from the specific

offenses he was found to have committed under Question 4, *supra*.

B. The failure to charge in the indictment, submit to the jury, and prove beyond a reasonable doubt that (1) The CCE defendants were principal administrators, and (2) the offense involved at least 300 times the quantity of cocaine described in §841(B)(1)(B) or $10 million in annual gross receipts violated defendants' rights because those facts led to an increase in the maximum sentence from discretionary life to mandatory life, in violation of the holding of this court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

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PETITION FOR WRIT OF CERTIORARI

Larry Hoover, Tirenzy Wilson, Gregory Shell, Jerry Strawhorn, Adrian Bradd, Darrell Branch, Andrew Howard, and William Edwards, respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 246 F.3d 1054. The impacting December 12, 1996 opinion of the district court is unreported, but reproduced at Pet. App. 18-31.

JURISDICTION

The judgment of the court of appeals was issued on April 12, 2001. Pet. App. 1a. The court denied a timely petition for rehearing and suggestion for rehearing *en banc* on May 14, 2001. Pet. App. 32a. On July 15, 2001, Justice Stevens granted petitioners an extension of time within which to file a petition for a writ of certiorari to and including September 26, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2510(f):

> "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device.

18 U.S.C. § 2518(3) states:

> Upon such application the judge may enter an ex parte order, as requested or modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that –
>
> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appeal to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

18 U.S.C. § 2518(8)(a) states:

The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to

the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

21 U.S.C. §848

(b) Life imprisonment for engaging in continuing criminal enterprise.

Any person who engages in a continuing criminal enterprise shall be imprisoned for life. . ., if–

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined.

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if–

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter–

(A) . . .

(B) from which such person obtains substantial income or resources.

STATEMENT

1. **Overview and related cases.** Petitioners were members of the Gangster Disciples (GD). The evidence in this case and related prosecutions revealed that at least from the 1980s until 1995 the GDs were a street gang operating an extensive drug distribution business in the Chicago area. On August 31, 1995, a federal grand jury in Chicago returned three separate indictments charging 39 gang leaders and others with, *inter alia*, conspiracy to distribute narcotics, *United States v. Irwin*, 149 F.3d 565, 569 (7th Cir. 1998), *cert. denied*, 525 U.S. 1031 (1998) (explaining partial background). The cases were separated in the district court; most went to trial. The Court of Appeals for the Seventh Circuit affirmed the various convictions and sentences, while rejecting defense challenges to unique questions surrounding electronic eavesdropping, and the Continuing Criminal Enterprise (CCE) convictions in a succession of cases in-

cluding *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000), *cert. granted in part*, judgment vacated, 531 U.S. 953 (2000) (re: *Apprendi*); on remand, 236 F.3d 886 (7th Cir. 2001) (affirming original sentences *Apprendi* notwithstanding); *cert. pending*, No. _____ (2001); *United States v. Smith*, 223 F.3d 554 (7th Cir. 2000); *cert. pending*, No. 00-8082; *United States v. Wilson [Hatcher]*, 237 F.3d 827 (7th Cir. 2001), *cert. pending*, Nos. 00-10047 and 00-10274 [Compton Jones]; *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000), *cert. pending*, No. 00-8520.

In *Hatcher, et al.* and *Jones*, Nos. 00-10047 and 00-10274, the pending cert. petitions urge conviction vacation predicated on significant questions surrounding the government's use of challenged tape recorded evidence in the GD prosecutions, as well as weighty questions revolving around the narrow position taken by the Seventh Circuit in connection with CCE jury instructions.

2. **This case.** On December 5, 1996, a federal grand jury in Chicago returned a 42-count superseding indictment charging petitioners, in count one, with conspiracy to possess with intent to distribute cocaine, cocaine base, heroin and marijuana, in violation of 21 U.S.C. § 846 (R. 191).

Count Two charged Hoover, Shell, Howard, Strawhorn and Wilson with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848, and other counts charged these five (the CCE defendants) with distribution of narcotics, 21 U.S.C. § 841(a)(1), use of minors and telephones in furtherance of the conspiracy, 21 U.S.C. §§ 861(a)(1) and (2) and 843(b), and use of a firearm during and in relation to the conspiracy, 18 U.S.C. § 924(c). *Id.* Branch was charged with two counts of money launder, 18 U.S.C. § 1956(a)(1)(B)(i).

Pretrial, petitioners jointly moved that the district court suppress the multiple tape recordings that were gleaned from conversations between Hoover and others. In 1993, Hoover was serving an Illinois prison sentence at the Vienna minimum security facility in southern Illinois. During October 1993, the government successfully petitioned the district court in Chicago for an order authorizing the taping of Hoover and his prison visitors in southern Illinois (clearly a district other than the Northern District of Illinois-Chicago). The government's taping plan included inserting a transmitting device onto visitor passes which would then intercept conversations. The intercepted conversation went to a receiver on the prison premises which was connected to a phone line in Chicago where agents taped the conversations (Tr. 31-40). Conversations were recorded from October 30, 1993 through December 19, 1993, when a visitor discovered the transmitter (Tr. 37-38). All told, there were hundreds of hours of tapes which provided the primary evidence against all the GD defendants, including petitioners. Following a pretrial hearing which included testimony from a former FBI agent regarding flagrant minimization violations, the district court rejected defense requests for tape suppression. Pet. App. 24-28, 30-31a.

On March 19, 1997, following the denial of pretrial motions, a joint jury trial commenced in the U.S. District Court, Chicago, Illinois. During trial, as pertinent to this petition, the challenged tape recordings were received by the jury. In addition the CCE petitioners urged that the trial court provide a jury instruction directing that the jury had to unanimously agree on which three or more offenses each CCE defendant committed. The district court, on government objection, rejected the instruction (Tr. 4530; Pet. App. 33-34a). On May 9, 1997, the jury found all seven guilty as charged (Tr. 5333-35).

The CCE defendants were sentenced to life-in-prison, and the conspiracy count was dismissed (concurrent sentences were imposed on the other counts). Branch was sentenced to 324 months on the conspiracy count, and to concurrent 20-year sentences on the money laundering counts. Bradd was sentenced to 292 months on the conspiracy count (his only charge).

On direct appeal, the court of appeals affirmed, *albeit* Circuit Judge Rovner's concurrent opinion is, for functional purposes, a dissenting opinion, 246 F.3d at 1063-65. Pet. App. 14-17a. In substance, Judge Rovner questioned whether her panel should blindly follow the opinion by Judge Posner in *United States v. Jackson*, 207 F.3d 910, 915-18 (7th Cir. 2000), because *Jackson* decided the tape "sealing" question(s) adversely to *Jackson* predicated on evidence nowhere found in the *Jackson* record, 246 F.3d at 1064-65. Pet. App. at 15-16a.

The petitioners are serving their respective sentences.

REASONS FOR GRANTING THE PETITION

The electronic eavesdropping issues, *infra*, significantly impact on the convictions and life sentences imposed on the petitioners and those seeking review in the related cases.

On at least three occasions within the published Seventh Circuit GD affirmations, the various panels opined that the tape recorded evidence played a pivotal role in the government's case(s) against the petitioners, e.g., *United States v. Hoover*, [this case] 246 F.3d at 1057 ("Hoover and his henchmen direct their strongest fire against the prosecution's best evidence—tapes of intercepted conversations, evidence so crushing that the rest

of the prosecution's case scarcely mattered." Pet. App. 2a); *United States v. Jackson*, 207 F.3d at 913 ("Some of the government's strongest evidence was obtained by electronic surveillance of Hoover."); *United States v. Smith*, 223 F.3d at 561 ("The government's investigation relied heavily on tape recordings of conversations among highranking GD members.").

1. **Whether pursuant to 18 U.S.C. § 2518(3), a federal district court judge in the Northern District of Illinois can authorize electronic eavesdropping in the Southern District of Illinois?** This question is squarely presented in the pending petition, *Hatcher, et al. v. United States*, No. 00-10047 at pp. 14-21. The government's July 2001 response to the *Hatcher, et al.* petition (as to this argument), states:

> This Court declined to review the same argument on the same facts in *Jackson v. United States*, 121 S.Ct. 376 (2000). We therefore waive our right to respond unless requested to do so by this Court.

Id. at pg. 10.[1]

This Court has yet to determine whether pursuant to 18 U.S.C. § 2518(3) a district court in one jurisdiction

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[1] The fact that the Court denied certiorari in *Jackson* is scarcely persuasive. As explained in *House v. Mayo*, 324 U.S. 42, 65 S.Ct. 517 (1945) (*per curiam*), "But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case." *Id.* at 48; *Brown v. Allen*, 344 U.S. 443, 456, 73 S.Ct. 397 (1953) (We have frequently said that the denial of certiorari "imports no expression of opinion upon the merits of a case.").

can judicially approve electronic eavesdropping in another jurisdiction. In pertinent part, § 2518(3) provides:

> Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).

Title III statutes are strictly construed, *Gelbard v. United States*, 408 U.S. 41, 47, 92 S.Ct. 2357 (1972). When divining Congressional statutory intent/construction, the rule is straightforward—"When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances," *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479 (1984). *Garcia* further explained "While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data which would justify a limitation on the 'plain meaning' of the statutory language." *Id.* at 75. Thus, we know from *Gelbard* that Title III enactments are strictly construed and from *Garcia*, that we look *only* to the language of the statute, absent exceptional circumstances. The "roving" wire tap language was added to § 2518 in 1986 to provide district courts the power to authorize extra-judicial eavesdropping when dealing with cell phones and the like.[2] However, the case at hand does not

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[2] In 1986, Congress added § 2518(11) which authorizes "roving" wire taps, see *United States v. Bianco*, 998 F.2d 1112, (continued...)

involve "roving" wiretaps—here the Seventh Circuit published opinion simply disclosed that a tiny transmitter or microphone was surreptitiously inserted into prison visitor badges, with a receiving device on prison premises which was connected to a phone line transmitting the conversations to Chicago where they were taped.

The court below rejected petitioners' arguments, *vis-a-vis*, whether the Northern District judge had the power to authorize out-of-district interceptions relying only on the flawed reasoning in *United States v. Jackson*, *ante*, 207 F.3d at 914-15. Pet. App. 2-3a. As explained in the pending cert. petition in *Hatcher, et al.*, No. 00-10047, at pp. 17-21, the *Jackson* reasoning has been rejected by the Eleventh Circuit and in an earlier Northern District court decision, *cf., United States v. Shields*, 675 F.2d 1152, 1157 (11th Cir. 1982), *cert. denied*, 459 U.S. 858 (1992) ("The other [acquisition] involved the tape recording and occurred at the time the recording was made, not when persons listened to the tape."); *Abbott v. Village of Winthrop Harbor*, 953 F.Supp. 931, 938 (N.D. Ill. 1996, Coar, J.) ("That some courts have interpreted 'aural' to mean the territorial jurisdiction requirement

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[2] (...continued)
1121-26 (2d Cir. 1993) (examining background of § 2518(11) while rejecting multiple defense challenges to that statute including, *inter alia*, Fourth Amendment arguments); *United States v. Gaytan*, 74 F.3d 545, 553-54 (5th Cir. 1986) (rejecting statutory and constitutional challenges to § 2518(11)); *United States v. Duran*, 189 F.3d 1071, 1084, n. 7 (9th Cir. 1999) (noting that § 2518(11) excludes certain § 2518 components when a roving wire tap involved); *United States v. Petti*, 973 F.2d 1441 (9th Cir. 1992), *cert. denied*, 507 U.S. 1035 (1993) (same).

of section 2518(3) applied to the place where the communications were first heard was at most the unintended artifact of the structure of the statute.").[3]

In light of advancing eavesdropping technology, this petition along with *Hatcher* (00-10047), provides this Court with the opportunity to resolve the interpretation of § 2518(3) (which has divided the lower courts) and, thus provide guidance to those courts on an issue which is significant to the administration of criminal justice.

♦♦♦♦♦

2. Whether the government can fulfill the requirement of providing a satisfactory explanation for its admitted failure to timely seal tape recordings obtained pursuant to Title III by providing, on appeal, for the first time an explanation which has no record support?

A. This Court should grant the Petition for Certiorari because the Seventh Circuit's decision excusing an admitted 34-day delay in sealing the Title III tapes without providing a satisfactory explanation directly contravenes the holding of the Court in *United States v. Ojeda-Rios*, 495 U.S. 257, 265 (1990).

The affirming panel characterized the Title III tapes [as] the "government's best evidence . . . evidence so crushing that the rest of the prosecution's case scarcely mattered." *United States v. Hoover*, 246 F.3d 1054, 1057 (Pet. App. 2a.). But the panel rejected petitioners' argu-

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[3] In *Abbott*, Judge Coar criticized the reasoning of some of the cases relied upon by the *Jackson* panel, 953 F.Supp. at 937-939 and nn. 6-7 (see *Jackson*, 207 F.3d at 914-15).

ment that the tapes were not timely sealed, as required by statute and *United States v. Ojeda-Rios,* by simply adopting its prior rulings in the companion cases in *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000), *vacated in part*, ___ U.S. ___ (October 30, 2000), and *United States v. Wilson*, 237 F.3d 828 (7th Cir. 2001), *cert. pending, sub nom. Hatcher v. United States,* 00-10047. Those prior decisions adopted as a satisfactory explanation for the government's admitted 34-day delay in sealing the tapes, a reason which had no evidentiary support in the trial record, but which was merely advanced for the first time on appeal in the government's responsive brief in *Jackson*.

The decision below regarding the sealing of the Title III tapes is directly contrary to controlling precedent of this Court and requires this Court to grant certiorari and vacate the judgment of the lower court. This Court construed the sealing provisions of Title III in *United States v. Ojeda-Rios*, 495 U.S. 257 (1990) and promulgated holdings that the court below in this case (246 F.3d at 1056-57) and the primary companion case upon which it relied (*Jackson,* 207 F.3d at 915), completely disregarded. This Court held that § 2518(8)(a) has, as its "primary thrust," ensuring the reliability and integrity of electronic surveillance evidence. While the presence of a court-ordered seal does not, in itself, establish integrity of tape-recordings, as the Court observed, the seal is a means to preclude the "opportunity to tamper with, alter, or edit the conversations that have been recorded. It is clear to us that Congress viewed the sealing requirement as important because it limits the Government's opportunity to alter the recordings." *Id.* at 263. Thus, the purpose of § 2518(8)(a)'s sealing requirement is to deprive the government of the *opportunity* to alter,

edit, destroy or tamper with original tapes, *e.g.*, *id.* at 263; *United States v. Gomez*, 67 F.3d 1515, 1524 (10th Cir. 1995) (Moreover, the government's argument runs completely counter to the purpose of sealing, which is to ensure that "subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded. *Ojeda-Rios*, 495 U.S. at 263, 110 S.Ct. at 1849.").

Thus, contrary to *Hoover,* 246 F.3d at 1056-57, and *Jackson*, 207 F.3d at 916, this Court has squarely held that it is unnecessary for the defendant to show or even suggest that there was *actual* tampering to require suppression; nor is suppression defeated by a governmental showing that no tampering occurred. The mere opportunity to do so is sufficient, because the failure to seal requires suppression under the statute. Indeed, in *Ojeda-Rios*, the Court rejected the very arguments the government made below and which the *Hoover* and *Jackson* panels accepted—because there was no showing of tampering, the delay should be considered, at worse, harmless. But the Court held, as evident from its decision and the plain wording of the statutory sealing provision "proof of non-tampering simply is not a substitute for a satisfactory explanation for the delay," 495 U.S. at 264-65; *see also United States v. Quintero*, 38 F.3d 1317, 1330 (3d Cir. 1994); *United States v. Vastola (Vastola I)*, 989 F.2d 1318, 1322 (3d Cir. 1993).

Moreover, in *Ojeda-Rios,* the Court squarely held that the government must obtain a court-ordered seal "immediately upon expiration of the underlying surveillance order," 495 U.S. at 263. When the government does not obtain an immediate court-ordered seal, it must provide an objectively reasonable explanation for the delay, meaning an explanation "not only why a delay occurred

but also why it is excusable." *Id.* at 265. The explanation cannot be *post hoc* (for example, raising a claim for the first time in an appellate brief) or contrived and the government bears the burden of proving the objective reasonableness with evidence of the explanation for a sealing delay. *Ibid., see also United States v. Vastola (Vastola II)*, 25 F.3d 164, 167 (3d Cir. 1994) (*appeal from* 830 F.Supp. 250 *after remand* in 989 F.2d 1318.) (The burden of proof is on the government to make this [justifiable delay] showing.).

Contrary to *Ojeda-Rios*, the Seventh Circuit *Hoover* decision (1) ruled that the petitioners had to show evidence of tampering, (2) the government did not need to present evidence of the *real reason* for the sealing delay before the district court, and (3) the court of appeals could accept a representation from counsel as to the real reason raised for the first time on appeal; 246 F.3d at 1057 (Pet. App. 2-3, 15-17a.); *Jackson*, 207 F.3d at 915-18. Each of these conclusions is legally unsupportable and cannot be reconciled with *Ojeda-Rios*.

In Circuit Judge Rovner's *concurring* opinion in *Hoover*, she reluctantly acknowledged that the *Jackson* panel decision was based on several "perplexing" assumptions, all of which run counter to the requirements of the law, 246 F.3d at 1063-65 (Pet. App. 15a.). To reach the conclusion that the *Jackson* panel had accomplished, and which the *Hoover* panel adopted, Judge Rovner noted that her panel accepted "as a satisfactory explanation for the delay an asserted reason which, although it may be true and accurate, has no support in the record." *Id.* (Pet. App. 15-16a.). Not only did that approach transgress *Ojeda-Rios*, it also ran counter to the well-established rule in all federal courts that arguments premised on factual assertions not contained in the record will be

disregarded. *Id.* Judge Rovner explained that "Materials significant [to an issue] should be presented to the district court, there to be tested in the usual adversarial ways. They may not be stored up for an appeal or generated . . . expressly for the appellate panel; this Court is in no position to cope with factual disputes. * * * 'An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below.' * * * Arguments in briefs are not evidence. * * *," 246 F.3d at 1064 (citations omitted); Pet. App. 15a.

Further, Judge Rovner did not understand (nor do the petitioners), how the government could have failed to place the "real reason" for the delay in the record in the trial court if that reason were genuine: "I cannot fathom why that reason was not spelled out in the affidavit, which was the only evidence before the district court, and remains the only evidence before this Court, as to the explanation for the delay in sealing the tapes," 246 F.3d at 1064. Pet. App. 16a. While it is true that rejection of the belated reason would result in suppression of the tapes, as Judge Rovner made plain, "the stakes were no doubt apparent to the government when the affidavit was prepared." *Id.* It is equally clear that § 2518(8)(a) contains "an explicit exclusionary remedy for noncompliance with the sealing requirement." *Ojeda-Rios*, 495 U.S. at 260. When the government does not immediately obtain a sealing order, and does not provide an objectively reasonable reason for the delay, evidence obtained from an interception order *must* be suppressed. *See Quintero*, 38 F.3d 1317, 1330 (3d Cir. 1994) (In summary, we conclude that a prosecutor's routine duties, hectic as that routine may be, are not a satisfactory explanation for failing to comply with the immediacy requirement of

§ 2518(8)(a). Were we to agree with the government, we would be rendering extraordinary that which is ordinary. We decline to do so.).

Notwithstanding § 2518(8)(a) and this Court's plain holding in *Ojeda-Rios*, the Seventh Circuit [here], and in *Jackson*, ignored the requirements of the law while embracing a reason for the sealing delay that had no record support and was advanced for the first time on appeal. That it did so, was clear to Judge Rovner ("the briefing in this case makes it abundantly clear that the key facts on which *Jackson* relied have no support in the record—*Jackson* itself leaves little doubt in that regard."—246 F.3d at 1065). Regarding whether the government offered the embraced reason for the first time on appeal, the *Jackson* panel made no bones about it:

> The government has one last string to its bow. *Although not in Safer's affidavit*, the government argues *in its brief to us* that the real reason for the delay was that it expected the new bugging apparatus to be completed sooner. Remember that Hoover discovered the original bug on December 19, at which point the government had two weeks to obtain either an extension or a judicial seal. If on January 2 the government reasonably expected the new bug to be completed and in working condition within a few days, this would be a reasonable basis for delaying the seeking of an extension for a few days. At some point it became clear that "a few days" were going to stretch on indefinitely; and then the government, having no immediate use for an extension (which depended on the new apparatus), did seek to have the recordings placed under judicial seal. If the technicians kept assuring the prose-

> cutors that the bug was a day away from completion, naturally the prosecutors would think they could wait another day. *As we say, this was argued in the government's brief but does not appear in Safer's affidavit*—which doesn't mean it's untrue, especially since it was one of the reasons the district judge gave for allowing the recordings of Hoover's conversations to be admitted into evidence; and the defendants do not argue that the government waived the point in the district court. There is no suggestion that the government postponed the sealing of the tapes in order to tamper with them, and in the absence of any such suggestion we have no reason to doubt that the delay did result from a mistake about when the new bugging device would be available. The defendants' reply that Safer and the technicians should have communicated with each other more effectively, which is true; but the failure of communication does not strike us, any more than it struck the district judge, as so wanton a blunder as not to constitute a (barely) satisfactory explanation within the meaning of the statute.

Jackson, 207 F.3d at 918 (ital. emph. added). Hence, the *Jackson* panel decision conceded that the "real reason" for the failure to seal, and the one reason it embraced, lacked record support and was originated on appeal.[4]

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[4] Ironically, the reason accepted by the *Jackson* panel was, in fact, never argued in its *Jackson* brief. (See: Consolidated Brief and Cross Appeal of the United States, *United States v. Jackson*, number 98-2696). None of the statements identified by the *Jackson* panel in the above-quoted segment were in

(continued...)

Acceptance of those propositions is directly contrary to law, is as plain an error as one ever finds in a reported decision, and would result in a "manifest injustice" if this Court allowed it to stand.

Just last Term, this Court reversed a decision of the Arkansas Supreme Court which announced a rule "flatly contrary to this Court's controlling precedent," in the fourth amendment context. *Arkansas v. Sullivan*, 121 S.Ct. 1876, 1878 (2001) (*per curiam*). No other basis existed for this Court's review other than the creation of

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(...continued)
the government's brief either literally or by implication. The closest the government comes to making any of those statements is [a] statement contained in its brief that after the discovery of the original device, there was a "need quickly to design and produce an improved device that would not be discovered." *Id.* at 46. The government never stated or argued that (beyond its "need"), it ever actually expected, reasonably or otherwise, that the new device would be completed sooner; that the government, as of January 2, 1994, reasonably expected the new bug to be completed and in working condition within a few days; that at some point it became clear that "a few days" were going to stretch on indefinitely; or that the technicians kept assuring the prosecutors that the bug was one-day-away-from completion. *Id.* at 44-51. Indeed, nowhere in that section of the government's brief does the phrase "a few days" ever appear. Thus, Judge Rovner's observation that the "untested and unverified assertions of a brief have become the foundation for the law of this circuit," 246 F.3d at 1064, is more painful for petitioners, and their counsel, than even Judge Rovner realized. What occurred, in fact, is that the *Jackson* panel's *misreading* of the government's brief formed the basis upon which convictions and life sentences have been appallingly affirmed.

a standard contrary to the one announced in the Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). The Court granted certiorari, vacated the decision and summarily reversed the Arkansas Supreme Court because the decision to apply a subjective test to a police officer's reasons for a traffic stop "cannot be squared with our [prior] decision in *Whren*" which held that subjective intentions play no role in the validity of a traffic stop. *Id.*

This Court's holding in *Ojeda-Rios*, that the inferior federal courts' inquiry into the adequacy of the reason for failing to timely seal Title III tapes is limited to whether a satisfactory explanation has been made and presented to the district court and not one presented to the court of appeals for the first time, is the "controlling precedent" on the sealing requirements of Title III tapes in the country and has been for over ten years. The Seventh Circuit's rule that, a reason not advanced before the trial court, and for the first time on appeal, can be a satisfactory explanation for the delay, is "flatly contrary to this Court's controlling authority." *Sullivan*, 121 S.Ct. at 1878.

Simply put, the panel decision below "cannot be squared" with the Court's decision in *Ojeda-Rios*. Thus, just as *Arkansas v. Sullivan*, *ante*, summary reversal is mandated because the court below declined to follow *Ojeda-Rios* (the case below is "flatly contrary to this Court's controlling authority.").

♦♦♦♦♦

3. Whether the Fourth Amendment and 18 U.S.C. § 2510(2) protects an Illinois prisoner from being tape recorded while conversing with a visitor, absent consent of any participant in the conversation?

In the ensemble, the pending Gangster Disciples cert. petitions (this petition added), briefly describes how during the fall of 1993 the government successfully importuned a federal district court judge in the Northern District of Illinois to allow eavesdropping from an Illinois prison located in the Southern District of Illinois. Larry Hoover, the purported titular head of the GDs, was serving the balance of an Illinois prison sentence in a minimum security facility in Vienna, Illinois. He had multiple GD visitors and commencing October 30, 1993, each visitor (required to wear a visitors' badge which encompassed a tiny microphone or transmitter) had their conversations (with Hoover) captured on tape. Many of Hoover's visitors appear as petitioners in this and related pending cert. cases (petitioners Bradd, Shell, Branch and Wilson in the case at hand). Hoover contends that he (and they) had [a] protected privacy interest which precluded the government from taping conversations (whether authorized *vel non.*).

The petitioners (Hoover included) *are not contending* that the government violated any recognized privacy rights in their individual cells. That assertion was rejected by the Court in *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194 (1984). In *Hudson,* the Court considered the dual interests that are implicated in putative privacy rights in a prisoner's cell. In pertinent part, the Court held that the balance favored institutional security—which we have noted is "central to all other correctional goals," *id.* at 527. But, the case at hand does not implicate "institutional security," because the government was involved in the investigation of ongoing gang activities in Chicago and Hoover was in a minimum security facility in southern Illinois, where petitioner and his visitors were allowed to stroll about the prison

grounds. (Although from time-to-time, Hoover and his visitors were in a prison-visiting room, but the government makes no assertion that any taping was the product of "institutional security" concern(s).)

Similarly, this case does not involve Hoover's privacy expectations on institutional telephones. The lower courts have consistently held that a custodial facility has the plenary responsibility of routinely taping inmate telephone calls in order to maintain "institutional security," see *United States v. Van Poyck,* 77 F.3d 285, 289-91 (9th Cir. 1996) (collecting cases); *United States v. Workman*, 80 F.3d 688, 692-94 (2d Cir. 1996) (same). Nor does this petition question the need for prison officials to monitor or tape conversations during non-contact visits. In point of fact, most State and many federal prisons do not allow "contact" visits (the prisoner and visitor are separated by a screen or glass partition and converse via telephone).

This case clearly involves an attempt by the government, pre-indictment, to *gather evidence* about gang activities in Chicago. The petitioners contend that the Fourth Amendment and § 2510(2) provides (and provided) a sound basis for suppression. The federal wiretap law defines an "oral communication" as ("any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). Before the interception of a conversation can be found to constitute a search under the Fourth Amendment or an "oral communication" under the federal wiretap law, therefore, the individuals involved must show that they had a reasonable expectation of privacy in that conversation. *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)

("application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action"); *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (government's surreptitious listening to and recording of telephone conversation "violated the privacy on which [petitioner] justifiably relied"); *Angel v. Williams*, 12 F.3d 786, 789-90 (8th Cir. 1993) ("oral communication" is a term of art under the federal wiretap law, referring only to communications uttered by a person reasonably expecting them to be private).

In *United States v. Peoples*, 250 F.3d 630, 636-38 (8th Cir. 2001), the court considered and rejected defense contentions that the trial court erred in refusing to suppress "in-person" tape recorded conversations between one of the defendants and an informant. The court examined a number of decisions regarding privacy expectations in connection with the taping of conversations between prisoners and [their] visitors. While affirming the district court's declination to suppress evidence, the court explained that "Prison inmates necessarily have reduced privacy rights because of the nature of incarceration and the myriad of institutional needs and objectives of prison facilities," *id.* at 637. However, the court explained:

> We agree with the district court's conclusion that CCA [the custodial facility] had legitimate security reasons for monitoring the conversations and *that the recordings were not made in an attempt to gather evidence about the robberies or the murder.*

250 F.3d at 637.

In juxtaposition to *Peoples*, there were no implicated security interests—the sole purpose of "requiring" Hoover's visitors to wear electronically implanted badges was to "gather evidence." And while the Court in *Lanza v. New York*, 370 U.S. 139, 82 S.Ct. 1218 (1962), declined to squarely hold that either the prisoner or visitor (in a jail visiting room), had Fourth Amendment protections, nonetheless, it appears that the Court has left that question open for further consideration.[5]

Petitioners are not contending any Good Conduct Medal entitlements. Rather, they collectively contend that the unique circumstances of the case at hand invite the Court to resolve significant Fourth Amendment questions surrounding the nature and extent of a prisoner's privacy interest(s), particularly where electronic eavesdropping is implicated.[6]

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[5] In *Lanza*, Justice Stewart intimated that based on the nature of the contempt conviction below, the Court was not required to determine the absolute presence or absence of Fourth Amendment protections ("But even if we accept the premise that the room at the jail where the petitioner and his brother conversed was an area immunized by the Constitution from unreasonable search and seizure, and even though we put to one side questions as to the petitioner's standing to complain, the petitioner's argument would still carry far beyond any decision which this Court had yet rendered.") (370 U.S. at 144-45).

[6] Justice Marshall's dissenting opinion in *Illinois v. Perkins*, 496 U.S. 292, 307, 110 S.Ct. 2394 (1990), pointed out [that] "Custody works to the State's advantage in obtaining incriminating information."

4. The petitioners are entitled to a new trial because the district court refused to instruct the jury that in order to convict the petitioners for violation of 18 U.S.C. § 848, the jurors must unanimously agree which three or more federal narcotics offenses each petitioner committed that constituted a continuing series of offenses.

Related cases: The same or similar Continuing Criminal Enterprise (CCE) statutory issues in this petition are pending before the Court in four petitions: (1) *Sherman Moore v. United States*, 00-7021; *Russell Ellis v. United States*, 00-7070; *Keith McCain v. United States*, 00-8282; and *Hatcher, et al. v. United States*, 00-10047. Thus, out of respect for brevity, we abbreviate the position of petitioners in this case.

The petitioners assert they are entitled to a new trial because the district court refused to instruct the jury that in order to convict the petitioners for violation of 18 U.S.C. § 848, the jurors must unanimously agree which three or more federal narcotics offenses each defendant committed that constituted a continuing series of offenses. The Court interpreted the law applicable to the CCE statute in *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707 (1999), which held that in a CCE case the jury must unanimously agree on which three or more underlying violation each defendant committed.

Here the district court did not instruct the jury that they had to unanimously agree on the three or more predicate acts that constituted the continuing series of violations required by the statute, notwithstanding a request by the petitioners for such an instruction (reproduced at Pet. App. 33-34). When petitioners' case was tried, the law of the circuit did not require such an

instruction, *United States v. Richardson*, 130 F.3d 765, 769 (7th Cir. 1997). Thus, per *Richardson*, the refusal to give the instruction requiring unanimous agreement on the predicate violations was clear error.

A. The petitioners are entitled to a new trial because the district court failed to instruct the jury that in order to convict the petitioners for violation of 18 U.S.C. § 848, the jurors must unanimously agree that each petitioner obtained substantial income from the specific offenses he was found to have committed under Question 4, *supra*.

The Court reserved judgment on the issue of whether the jury must find that the substantial income requirement under 21 U.S.C. § 848(c)(2)(B) must come from the predicate acts upon which the jury must unanimously agreed. However, Justice Kennedy, in *Richardson* dissent (joined in by Justices O'Connor and Ginsburg), explained, "the necessary consequence of the Court's ruling is that the three specific crimes must be the ones, in the words of the statute, 'from which [the accused] obtains substantial income or resources,' even though the form of the income does not matter." *Richardson*, 119 S.Ct. at 1716-17. The CCE petitioners contend that the district court erred in denying the instruction they requested that the substantial resources obtained by a defendant should have to be from the particular offenses that the jury found to constitute "a continuing series of violations" for a particular defendant. This is by far the most logical reading of the statute after *Richardson*. This portion of the statute requires that, "(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter – (B) from which such person obtains substantial income or resources." The phrase "from which" clearly refers to the

continuing series of violations. Before *Richardson*, it could be argued that the word "which" could refer to any other the violations from which the jury could have selected the series. But post-*Richardson* such a reading is not possible.

The petitioners' reading of this § 848 subsection is bolstered by the opinions of the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Castillo v. United States*, 530 U.S. 120 (2000). *Castillo* holds that the determination of whether the weapon possessed by a defendant charged with a violation of 18 U.S.C. § 924(c)(1) is a machine gun must be made by the jury.

While *Apprendi* and *Castillo* both deal directly with sentencing issues, together and in conjunction with *Richardson* and *Jones v. United States*, 526 U.S. 227 (1999), they reflect the restoration of the central role that this Court has recently accorded to the jury in criminal cases. That salutary development should be applied in this case to require that the jury find that the "substantial resources or income" be derived from the specific predicate acts that this court has already required to be found to have been committed by the particular defendant.

B. The failure to charge in the indictment, submit to the jury, and prove beyond a reasonable doubt that (1) The CCE petitioners were principal administrators, and (2) the offense involved at least 300 times the quantity of cocaine described in §841(B)(1)(B) or $10 million in annual gross receipts violated petitioners' rights because those facts led to an increase in the maximum sentence from discretionary life to mandatory life, in violation of the holding of this court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Petitioner Wilson and the other four CCE petitioners were sentenced to life in prison under the mandatory life imprisonment provision of section 848(b), based upon findings by the trial court, by a preponderance of the evidence, that they were principal administrators and that the CCE violation involved at least 150 kilograms of cocaine or 1.5 kilograms of crack or $10 million in annual gross receipts. Count Two of the indictment in this case, charging the CCE violation, does not allege either that the five petitioners were principal administrators or that the violation involved at least 150 kilograms of cocaine or 1.5 kilograms of crack or $10 million in annual gross receipts.

Apprendi v. New Jersey, 530 U.S. 466 (2000), held that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. This holding is founded upon the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment.

The CCE statute in section § 848(a) provides that the maximum penalty for conviction simpliciter of that statute is "a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment. . ." Subsection 848(b), on the other hand, states in pertinent part that "any person who engages in a continuing criminal enterprise shall be imprisoned for life . . . if (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers or leaders; and (2)(A) the violation . . . involved at least 300 times the quantity of a substance described in section 841(b)(1)(B)." The issue presented in this appeal is whether the penalty in subsection(b) is greater than the penalty in

subsection (a). The petitioners submit that it is and that their rights under the Fifth and Sixth Amendments have consequently been violated.

Apprendi's holding is triggered by facts that increase the maximum sentence. Petitioners submit that a sentencing provision that requires the imposition of a life sentence is inherently more severe than a sentencing provision that allows a judge to impose a sentence of between 20 years and life. Under the latter, a defendant will always have the possibility of less than a life sentence, whereas under the former a defendant will never have the possibility of less than a life sentence. Indeed, this Court has recognized that a "life sentence without parole is the second most severe penalty permitted by law." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Another way of stating the same proposition is that in order for mandatory life not to be greater than discretionary life, they would have to be equal. But a mandatory life maximum is simply not identical to a discretionary life maximum.

The facts of petitioner Wilson's case illustrate the disparate impact of the two penalty provisions. The jury made no findings as to quantity for petitioner Wilson.[7] But even if the jury had found 150 or more kilograms of cocaine to be attributable to petitioner Wilson, under the Sentencing Guidelines petitioner Wilson would have a

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[7] There was extensive testimony about his role in the political and community activities of the GDs. A jury could well have found that petitioner Wilson, as Governor only of the Englewood area of Chicago, was not responsible for the 150 kilograms of cocaine that the district court attributed to Wilson.

criminal history category of I and a CCE Guideline offense level of 42. Based on that, petitioner Wilson's guideline range would be 360 months to life. There is no basis for assuming that he would have received the life sentence. In fact, with a Criminal History Category of I and with little evidence of violence on Wilson's part presented at trial, it is far more likely that he would have received considerably less than life. Thus, there is not just a possibility, but rather a probability, that Wilson's sentence would have been less than life. Consequently, Wilson's case illustrates how section 848(b) increases the maximum penalty by changing the penalty Wilson faces from probably less than life to mandatory life.[8]

For all of the foregoing reasons, petitioners submit that section 848(b) raises the statutory maximum. Therefore the facts that effectuate the raise must be found by the jury. Those facts are principal administrator status of the defendant, and whether the requisite quantity of drugs or annual gross receipts were involved. Those factual issues were not submitted to the jury in this case and petitioners' sentences under subsection 848(b) must therefore be vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Defendant Wilson was arrested on April 30, 1996, and has been incarcerated ever since. He was 26 years old at the time of his arrest. A 30 year sentence does not exceed the life expectancy of a 26 year old.

Respectfully submitted,

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APPENDICES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-2600, 98-2820, 98-2915, 98-3433,
98-3840, 99-1377, 99-2142 & 00-2520

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LARRY HOOVER, TIRENZY WILSON, GREGORY SHELL, JERRY STRAWHORN, ADRIAN BRADD, DARRELL BRANCH, ANDREW HOWARD, and WILLIAM EDWARDS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CR 508—**Harry D. Leinenweber**, *Judge*.

ARGUED MARCH 2, 2001—DECIDED APRIL 12, 2001

Before CUDAHY, EASTERBROOK, and ROVNER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. The Gangster Disciples, a large and vicious street gang, sells great quantities of cocaine, heroin, and other drugs in Chicago. A series of cases has seen the conviction of many members, some of them high in its hierarchy. See *United States v. Ray*, 238 F.3d 828 (7th Cir. 2001); *United States v. Wilson*, 237 F.3d 827 (7th Cir. 2001); *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000); *United States v. Smith*, 223 F.3d 554

(7th Cir. 2000); *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000), remanded, 121 S. Ct. 376 (2000), decision on remand, 236 F.3d 886 (7th Cir. 2001); *United States v. Irwin*, 149 F.3d 565 (7th Cir. 1998). Today we deal with eight more members of the organization, including Larry Hoover, its "chairman of the board"; Gregory Shell, Hoover's second in command; Andrew Howard, the third of the gang's "directors"; and two "governors" (Tirenzy Wilson and Jerry Strawhorn). The other three appellants were lower in the hierarchy but still deeply involved in its operations. The five directors and governors, the gang's top echelon, have been convicted of operating a continuing criminal enterprise, 21 U.S.C. §848, and sentenced to life imprisonment. Of the remaining three appellants, William Edwards was sentenced to life imprisonment and Adrian Bradd to 292 months' imprisonment for conspiring to distribute drugs, while Darrell Branch was sentenced to 324 months' imprisonment for conspiracy plus money laundering.

Many of the arguments these eight defendants present on appeal have been dealt with by the panels that affirmed the convictions of other gang members. For example, Hoover and his henchmen direct their strongest fire against the prosecution's best evidence—tapes of intercepted conversations, evidence so crushing that the rest of the prosecution's case scarcely mattered. Defendants offer three principal arguments: that a district judge in the Northern District of Illinois lacked authority under 18 U.S.C. §2518(3) to authorize interceptions of conversations that occurred in the Southern District of Illinois, that the statutory authority for roving surveillance is unconstitutional, and that the recorded conversations must be suppressed because the original tapes were not sealed promptly after the authorization expired, as 18 U.S.C. §2518(8)(a) requires. All of these arguments were made in *Jackson* and rejected there with respect to these very tapes. 207 F.3d at 914-18. Although the Supreme Court

remanded in *Jackson* so that we could consider the effect of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), the petition for certiorari was denied to the extent that it sought review of the wiretap issues. Relying on *Jackson*, we rejected in *Wilson* arguments materially identical to those now presented. 237 F.3d at 831. Our appellants have offered some additional arguments, such as a contention that the affidavits do not show the necessity of using interceptions, as opposed to other investigative techniques, but these are weak. None of the new arguments is persuasive, and the new versions of the old arguments run headlong into the law of the circuit. Now that the court has held that these tapes were properly admitted in two other trials, and rehearing en banc and certiorari have been denied on that subject, it would be inappropriate for a third panel to offer an independent view as if the matter were presented for the first time. Therefore, just as in *Wilson*, we reject on the basis of *stare decisis* appellants' contention that the use of these tapes requires reversal.

Similarly we conclude that the CCE convictions are valid whether or not Hoover and the other leaders personally committed the predicate offenses on which the CCE convictions depend. So we held in *Wilson*, 237 F.3d at 833-34, and *Smith*, 223 F.3d at 573. Cf. *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (en banc) (aiding and abetting a kingpin can support a CCE conviction). Predicate offenses include violations of 21 U.S.C. §841 (the principal substantive drug crimes). One way of violating §841 is to join a conspiracy whose members defy that statute. This is the holding of *Pinkerton v. United States*, 328 U.S. 640 (1946): every member of a conspiracy is substantively culpable for other conspirators' acts within the scope of the conspiracy. This means that Hoover and other top managers have violated §841 whether or not they sold drugs (or committed the conspiracy's other crimes) personally. Requiring personal commission of the predicate

offenses would essentially knock out the sentencing enhancements that §848 provides for kingpins, who delegate the dirty work. They direct others in selling drugs or rubbing out rivals, and if this insulated them from culpability then §848 might as well be repealed. Using as predicate offenses crimes committed by a different branch of the organization also is appropriate. Wilson and Strawhorn want us to proceed as if the Gangster Disciples were multiple organizations, one for each territory controlled by a governor, but that is not what the jury found: they were convicted of a *single* conspiracy and under *Pinkerton* are answerable for the crimes committed by the whole of that organization.

Because a lawful punishment for *every* CCE conviction is life in prison, we held in *Smith* that *Apprendi* does not affect sentencing for this offense. The three defendants who were not convicted under §848 have a sound contention that the district court committed error by not telling the jury to determine the kind and quantity of drugs that they distributed. But these defendants did not request such an instruction in the district court, so appellate review is limited to a search for plain error. Only a miscarriage of justice could justify a remand. See *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Olano*, 507 U.S. 725 (1993); *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000). What must be proved beyond a reasonable doubt after *Apprendi* is the minimum quantity needed to authorize a particular punishment. Given 21 U.S.C. §841(b)(1)(A)(iii), a conclusion that Edwards conspired to distribute 50 grams of crack cocaine would authorize life imprisonment; even 5 grams would do for Bradd and Branch, who were sentenced to fewer than 40 years. See 21 U.S.C. §841(b)(1)(B)(iii). Evidence in the record establishes beyond any doubt that the Gangster Disciples distributed (much) more than 50 grams of crack daily, so given *Pinkerton* (and the jury's verdict convicting each appellant of the over-arching conspiracy) there is no

likelihood that any reasonable jury would have failed to find that each is culpable for more than 50 grams of crack. Plain error has not been established. Defendant Wilson's variations (adopted by other defendants) on the *Apprendi* argument fare no better. Wilson contends that any fact raising a mandatory minimum penalty must be established beyond a reasonable doubt, even if the statutory maximum is life. *Smith* addressed and rejected that precise argument. As for the contention that §841 and §848 are unconstitutional (and therefore cannot support any conviction at all) because they do not designate as "elements" the quantities of drugs that matter to punishment: that position is considered, and rejected, in *United States v. Brough*, No. 00-2695 (7th Cir. Mar. 22, 2000).

Thus we arrive at issues unique to these defendants. The most serious is a *Bruton* problem (see *Bruton v. United States*, 391 U.S. 123 (1968)) created when the district judge permitted the prosecutor to use against Andrew Howard a statement that named Hoover and Shell as the gang's top bosses. *Bruton* holds that it violates the confrontation clause of the sixth amendment to admit against one defendant a confession accusing a co-defendant, when the declarant will not testify and thus cannot be cross-examined. Judges' instructions to consider the statement solely against its maker will be impossible to follow, the Court concluded. *Bruton* left open the possibility of redacting a confession to avoid the problem, and *Richardson v. Marsh*, 481 U.S. 200 (1987), held that some forms of redaction are permissible. Seizing this opening, the prosecutors amended Howard's confession so that "incarcerated leader" replaced every reference to Hoover, and "unincarcerated leader" every reference to Shell. (Hoover ran the Gangster Disciples from state prison, apparently bribing guards with cash and drugs to be allowed the freedom to do this; Shell, who was released from state prison in 1992, was Hoover's ambassador on the outside from then on.) Only a person unfit to be a juror could

have failed to appreciate that the "incarcerated leader" and "unincarcerated leader" were Hoover and Shell; we doubt that the majority in *Richardson* would have countenanced so transparent a device. No matter, because in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court placed close limits on the use of pseudonyms and indirect references. The Court wrote: "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result." *Id.* at 192.

The district judge cannot be faulted for failing to anticipate *Gray*, which was issued after the trial; but we are surprised that even after *Gray* the United States contends that no error occurred. "Incarcerated leader" and "unincarcerated leader" are obvious stand-ins for "Hoover" and "Shell." A name is itself just one among many means of identification. The amended confession just gave Hoover and Shell aliases based on their occupations. It no more concealed their identities than the substitution of "Mark Twain" for "Samuel Clemens" conceals the author.

The prosecutor relies on *United States v. Stockheimer*, 157 F.3d 1082, 1086 (7th Cir. 1998), for the proposition that *Bruton* and *Gray* permit the use of placeholders when their incriminating nature is not apparent to persons unaware of the other evidence offered at trial. True enough, the panel in *Stockheimer* remarked that the altered confession, which referred to an "inner circle" of persons, would not have incriminated the non-confessing defendants without considerable other evidence. But the proposition that replacing a name with a pseudonym is proper unless the identity of the alias can be deduced within the four corners of the confession is incompatible with *Gray*, and we do not read the opinion in *Stockheimer* to adopt what was, after all, the main argument of the dissenting opinion in *Gray*. Very little evidence is incriminating

when viewed in isolation; even most confessions depend for their punch on other evidence. To adopt a four-corners rule would be to undo *Bruton* in practical effect. An alteration that uses an open-ended reference such as "inner circle" at least avoids a one-to-one correspondence between the confession and easily identified figures sitting at the defense table. "Incarcerated leader" and "unincarcerated leader" are just the sort of symbols that the majority in *Gray* had in mind. If the prosecutors wanted to use Howard's confession yet avoid a severance, they had to make substantially greater alterations to avoid the obvious pointers.

Nonetheless, the *Bruton* error was harmless beyond a reasonable doubt. The tapes scuttled Hoover's defense. Shell received less mention in the tapes, but Howard's words could not have mattered to the jury's consideration of the case against Shell given seven weeks of other damning evidence. Indeed, the defense pretty much sewed up the prosecutor's case. Hoover and Shell admitted that they were the leaders of what everyone called the "GD" but contended that since 1987 "GD" has stood for "growth and development" rather than "Gangster Disciples." Shell portrayed himself as the CEO of an organization of community activists committed to cleanup, education, political awareness, and suppression of gang and drug activities. Other evidence introduced at trial made mincemeat of that defense (the only gang and drug activities being suppressed were those of the GD's rivals), leaving Shell's admission that he was No. 2 in the GD equivalent to a confession. His conviction cannot plausibly be traced to the thinly disguised accusations in Howard's statement.

Two arguments about co-conspirator hearsay come next. All defendants contend that the district court should not have allowed any co-conspirator evidence to be admitted without first holding an evidentiary hearing to supply a basis for a conclusion that a conspiracy existed and the statements were in furtherance of that conspiracy. See

Fed. R. Evid. 104, 801(d)(2)(E). A hearing is one way to go about the task, see *United States v. James*, 590 F.2d 575 (5th Cir. 1979) (en banc), but not the only or even the best way. A judge may act on the basis of a pretrial evidentiary proffer or evidence introduced in the early stages of trial. See *United States v. Martinez de Ortiz*, 907 F.2d 629 (7th Cir. 1990) (en banc); *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978). The district judge's decision to admit co-conspirator hearsay in this case was supported by a preponderance of the evidence demonstrating that a conspiracy existed and that the statements had been made during and in furtherance of its objectives. That is so even for the statements to which Strawhorn particularly objects. Tyrone Reames testified that in August 1988 Strawhorn and another gang member threatened to "take care" of Reames unless he changed his account of a murder in which two gang members had been implicated. Strawhorn observes that Reames was not a member of the Gangster Disciples, and we shall assume that this is so. But the declarant in the statement being admitted was Strawhorn, not Reames (who was available for cross-examination). Much evidence showed that the Gangster Disciples protected their organization by threatening to "take care" of potential witnesses (and by using violence against them when threats were insufficient). The district judge did not abuse his discretion in concluding that Strawhorn threatened Reames in furtherance of the conspiracy's objective of protecting itself (and its members) from criminal prosecution. It could not be excluded under Fed. R. Evid. 404(b) as other-crime evidence, because it was part of the very crime (conspiracy) of which Strawhorn had been indicted. The statement therefore was admissible.

Shell and Strawhorn were not the only defendants whose words came to haunt them at trial. The defense rested without presenting any testimony by Bradd, and the prosecution began its rebuttal case. Bradd then changed his mind and asked for an opportunity to testify.

The district judge had the discretion to say that he had waited too long, but the judge elected to grant Bradd's request. None of the other defendants objected. Soon they wished that they had, because Bradd's testimony inculpated not only himself (he admitted being a drug dealer but claimed that he had quit the GD and usually operated independently) but also Hoover and other defendants whom Bradd depicted as drug lords. Bradd supported the prosecutor's claim that Hoover initiated a program under which members of the Gangster Disciples would "donate" their profits from drug sales one day each week to supervisory levels of the gang. (This program, known variously as "nation work" and "one-day-a-week", had been a bone of contention at trial. Other defendants contended that references on the tapes dealt only with working for community betterment one day a week. Bradd supported the prosecution's view.) Other defendants then moved for a mistrial or a severance. The district judge denied both requests and did not abuse his discretion in doing so. If Bradd had testified during the defense's case there would have been no occasion for either a mistrial or a severance. See *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). Finger-pointing among the defendants is not only acceptable but also a benefit of a joint trial, for it helps the jury to assess the role of each defendant. Defendants believe that things are otherwise if the evidence comes after the close of the defense case, but we cannot see why—nor do we understand what difference it makes whether the district judge recognized that he had discretion to block Bradd's testimony or thought instead (though wrongly) that a defendant's entitlement to testify on his own behalf supersedes the rules for the orderly presentation of evidence. The harm to the other defendants would have been much the same had Bradd testified before the defense rested. They contend that if Bradd had testified sooner they could have countered his evidence more effectively, but this is not so; the district judge gave them adequate opportunity to respond to Bradd's testimony as things transpired.

One final issue arising out of the trial requires comment. (Defendants make many additional claims of trial error, but none requires discussion.) Wilson testified in his own defense that he joined the GDs in 1987 when it was solely a civic improvement organization and that neither he nor anyone he associated with was involved in drug trafficking. In rebuttal, the government called Naseen Soldana, Wilson's former wife, who testified that in late 1992 or early 1993 Wilson asked her for an introduction to Reynard McDowell, from whom Wilson sought to buy 15 kilograms of cocaine. Soldana made the introduction, McDowell quoted a price of $270,000, Wilson came up with that sum, and Soldana acted as his agent to finish the deal (paying McDowell and returning the drugs to Wilson). Soldana testified that Wilson and McDowell later had at least two other transactions of 26 kilograms apiece. Following her separation from Wilson, Soldana became romantically involved with McDowell, who later was prosecuted on drug charges. She testified under a grant of immunity as part of a plan to reduce McDowell's sentence. On learning that Soldana would take the stand in the prosecutor's rebuttal case, defendants asked the judge to issue a writ of habeas corpus to produce McDowell in Chicago for an interview, so that they could determine whether he might undermine Soldana's testimony. The court declined to do so unless defendants first ascertained from McDowell's attorney whether McDowell would consent to be interviewed (and to testify), for if McDowell would balk and assert his privilege against self-incrimination, the exercise would be pointless. On learning from McDowell's lawyer that McDowell would not cooperate with the defendants, the district judge declined to issue the writ.

Wilson contends that this episode violated his right under the sixth amendment to "have compulsory process for obtaining witnesses in his favor", but his problem is that McDowell did not seem likely to be a witness "in his favor", or indeed a witness of any kind. Soldana's testi-

mony depicted McDowell as the supplier of 67 kilograms of cocaine. He has not been convicted of those sales, and the defense wanted to paint him not only as a drug dealer but also as a person who had suborned perjury; risks of prosecution for these offenses entitled McDowell to invoke his privilege against compulsory self-incrimination. If the district judge had gone off half-cocked, predicting that McDowell would invoke the privilege without troubling to check, then we would be receptive to an argument that he abused his discretion (which is the right standard of review). See *United States v. Williamson*, 202 F.3d 974, 978-79 (7th Cir. 2000). But the judge deferred decision until inquiry could be made, and only after learning that McDowell would clam up did the judge deny the defense request. We agree with the judge's assessment. It would have been wasteful—and could have caused a substantial and unproductive delay of a week or more—to fetch McDowell by Con Air from Florida only to have him repeat in court what he had told his lawyer. Even now the defendants have no indication that McDowell's lawyer misunderstood or misrepresented his client's intentions.

Sentencing is the final subject of discussion. The United States has confessed error with respect to Branch's sentence, and after an independent review we agree that an error has been made. The district judge assessed one criminal history point for Branch's 1980 conviction for resisting arrest. That put Branch in criminal history category IV (he had six other, undisputed, criminal-history points) and led to a sentencing range of 324 to 405 months under the Sentencing Guidelines. The judge imposed a sentence of 324 months, the bottom of this range, which suggests that Branch might have received an even lower sentence had his background been assessed as category III, for which the sentencing range would have been 292 to 365 months. Like the United States, we think that category III is the correct one, because U.S.S.G. §4A1.2(c) disregards Branch's conviction for resisting ar-

rest. A conviction for resisting arrest leads to a criminal history point only if the defendant received at least 30 days' imprisonment or one year's probation. Branch's sentence to two days (time served before his guilty plea) was well short of that. He therefore must be resentenced within the range of 292 to 365 months. Branch's original sentence of 324 months is below the middle of the reduced guideline range, so the district judge may elect to impose the same sentence on remand, but if he does this the judge should explain why the change in criminal history did not affect the sentence.

None of the other arguments concerning sentencing calls for a reduction. The life sentences for the CCE defendants are foreordained. And although we may assume, as the other three defendants insist, that the one-day-a-week program did not get off the ground and that the nation-work program (which did) entailed smaller quantities, the sums the leaders hoped to rake in were so large that they conveyed to other defendants, such as Bradd, the scale of the organization, which enabled them to anticipate (and so be held accountable for) sales other than those in which they personally participated.

The judgments are affirmed with respect to all defendants other than Branch. His conviction is affirmed but his sentence is vacated, and the case is remanded with instructions to impose a new sentence from the range of 292 to 365 months' imprisonment.

CUDAHY, *Circuit Judge*, concurring. Although it probably did not affect the outcome, the admission of Reames' testimony about Strawhorn's threats raises serious questions. Tyrone Reames was permitted to testify that in August 1988, he witnessed a murder committed by two Gangster

Disciples from his neighborhood. Two years later, as the Gangster Disciples' state court murder trial date approached, Reames said he was approached by Strawhorn and another Disciple, who grabbed him and took him to see "Coal Black," who was identified as Robert Dordies, another Disciple. Strawhorn and Dordies, according to Reames, threatened that if Reames did not change his account of the murder to exculpate the Disciples charged with it, Strawhorn would "take care of" him. Reames himself was not a member of the Gangster Disciples or any other street gang, and the alleged murder had nothing to do with the drug conspiracy charged in this case.

The government offered the Reames testimony to show, among other things, an example of enforcement of the law of silence and secrecy in the gang. The district court instead found that "in order to make the conspiracy go, they offered protection to certain people and one of the ways they did that was to intimidate people from testifying. So, it seems to me one of the main procedures that gangs have always—not gangs so much as organized crime activities—have always been conducted."

There may be some marginal relevance to Reames' testimony as showing gang practices in enforcing silence about gang crimes. As the district judge said, this was the way of organized crime. But the facts surrounding Reames' testimony had nothing to do with the drug conspiracy with which the Disciples were charged.

It was uncontested at trial that Strawhorn was a longstanding member of the Disciples with the rank of governor and that he knowingly assented to gang rules. The probative value of showing his threats to silence witnesses in matters having nothing to do with the distribution of drugs is slight while the prejudice attaching to hushing up a witness could hardly be greater. Indeed, we have noted that evidence of witness intimidation constitutes "a striking example of evidence that appeals to the jury's

sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir. 1996). The introduction of this testimony, therefore, exposed heinous conduct typical of organized crime but which had no plausible connection with the drug conspiracy. Although the outcome may not be affected, Reames' testimony should not have been admitted.

ROVNER, *Circuit Judge*, concurring. I join the court's opinion. I write separately only to express my concern about the findings of a previous panel of this court regarding the government's failure to have the Vienna surveillance tapes sealed immediately upon expiration of the surveillance warrant, as 18 U.S.C. § 2518(8)(a) required. *See United States v. Jackson*, 207 F.3d 910, 915-18 (7th Cir.), *remanded on other grounds*, 121 S. Ct. 376 (2000). *Jackson* concluded that none of the documented reasons that the government gave to the district court for waiting 32 days to have the tapes sealed constituted the "satisfactory explanation" for the delay that section 2518(8)(a) demands. 207 F.3d at 915-18. Rather than ordering the tapes suppressed, however, the court embraced an explanation founded on facts that were not asserted in the affidavit submitted by the prosecutor in charge of the surveillance. *Id.* at 918. If indeed the "real reason" for the delay was the government's expectation, based on the assurance of technicians, that a new and smaller microphone would become available within a day or two, an assurance that purportedly was repeated until finally "it became clear that 'a few days' were going to stretch on indefinitely," *id.*, then I cannot fathom why that reason was not spelled out in the affidavit, which was the only

evidence before the district court, and remains the only evidence before this court, as to the explanation for the delay in sealing the tapes. *See id.* at 916. Even more perplexing to me is this court's decision to accept as a satisfactory explanation for the delay an asserted reason which, although it may be true and accurate, has no support in the record.

We routinely disregard arguments premised upon factual assertions that are not borne out by the record. *E.g.*, *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990) ("An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below."); *Box v. A&P Tea Co.*, 772 F.2d 1372, 1379 n.5 (7th Cir. 1985) ("arguments in briefs are not evidence"), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3311 (1986); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n.16, 90 S. Ct. 1598, 1608 n.16 (1970); *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851). We do not allow parties to stray beyond the bounds of the record for reasons so obvious and familiar that they scarcely require mention: if the evidence upon which a party bases its argument is not in the record, then the opposing party has not had the opportunity to respond appropriately, the district court has never had the opportunity to assess that evidence, and last, but by no means least, when push comes to shove, the "evidence" may never materialize—litigants often make representations that turn out to be inaccurate. I have no reason to think that the government has misrepresented the facts, but if indeed the "real reason" for the delay in sealing the tapes was the prosecutor's expectation that a more discreet microphone would shortly become available, then some evidence of that expectation should have been produced long before the record closed and the *Jackson* case was on appeal. Instead, the unverified and untested factual assertions of a brief have become the foundation for the law of this circuit, binding panel after panel hear-

ing the Gangster Disciple appeals and defendant after defendant—none of whom has ever seen any evidence bearing out the government's asserted rationale for the delay in sealing the tapes.[1]

Our credibility as a judiciary depends in great measure upon the consistency and fairness with which we honor our own rules. At oral argument, Mr. Edwards' counsel observed that if he were to make assertions outside of the record, we would not tolerate it for a moment. He is right. The government should be treated no differently. Obviously, suppression of the tapes—described in *Jackson* as "[s]ome of the government's strongest evidence," 207 F.3d at 913, and here as its "best evidence . . . , evidence so crushing that the rest of the prosecution's case scarcely mattered," *ante* at 2, might have dire ramifications for the government's case. Yet, the stakes were no doubt apparent to the government when the affidavit was prepared. I do not understand why the government should be relieved of the obligation to make a record in support of its arguments—particularly its "real reason" for a crucial delay in complying with a statutory requirement—when we would not relieve any other litigant of that obligation. Simply because the ramifications are odious does not justify a departure from the basic tenets of fairness, common sense, and the rule of law.

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[1] *Jackson* notes that the district judge himself relied on the government's explanation as a reason for admitting the belatedly sealed tapes into evidence. 207 F.3d at 918; *see United States v. Parks*, No. 95 CR 510, 1997 WL 136761, at *20 (N.D. Ill. March 24, 1997). To the extent that is true, it hardly justifies this court's resort to asserted facts that are without support in the record; our review of the sufficiency of the government's explanation must focus on the *evidence* submitted to the district court. *See United States v. Ojeda Rios*, 495 U.S. 257, 267, 110 S. Ct. 1845, 1851 (1990) (majority); *id.* at 267-68, 110 S. Ct. at 1852 (O'Connor, J., concurring).

It is with the greatest reluctance that I criticize the holding of another panel of my colleagues. But the same issue that confronted the panel in *Jackson* is squarely presented here, and the briefing in this case makes it abundantly clear that the key facts on which *Jackson* relied have no support in the record—*Jackson* itself leaves little doubt in that regard. After much reflection, and with a heavy heart, I have concluded that I cannot remain silent with respect to this court's unusual decision to accept the government's unverified allegations as "a (barely) satisfactory explanation" for the government's delay in complying with its statutory obligations. *See* 207 F.3d at 918.

I accept, as I must, the panel's holding in *Jackson*; it is the law of this circuit vis à vis the admissibility of the Vienna tapes. *See United States v. Wilson*, 237 F.3d 827, 831 (7th Cir. 2001); *ante* at 2-3. I do so, however, with great reservation as to the prudence of this court's decision to accept as fact crucial assertions made only in a brief, and with the hope that in the future, the government will make an appropriate record as to its "real reason" for any failure to comply with the requirements of Title III.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated December 12, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	No. 95 CR 508
	)	
	)	Judge
LARRY HOOVER, et al.,	)	Harry D. Leinenweber
	)	
Defendants.	)	

Defendants in the above captioned case have submitted a number of pre-trial motions, the disposition of which are detailed below.

MOTIONS TO DISMISS INDICTMENT

Defendant Larry Hoover moves to dismiss the indictment against him, or as a less favored alternative, to change venue because of prejudicial and inflammatory pretrial publicity. Although pretrial publicity has been extensive, the court is convinced that careful voir dire examination will more appropriately determine whether an impartial jury can be seated in this venue. As a result, the court denies the motion without prejudice. If, during the course of jury selection, it becomes apparent that an impartial jury cannot be impaneled, defendant may renew the motion.

The government submits a motion asking the court to dismiss the indictment against Darry Johnson without

prejudice. The court orders the government to submit a reply to defendant Johnson's response.

MOTION TO DISMISS COUNT I

Defendant Shell moves to dismiss Count I as (1) impermissibly vague and (2) duplicitous. As to vagueness, Count I asserts a sufficiently precise conspiracy claim. "(A]n indictment under 21 U.S.C. § 846 is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, even if it fails to allege any specific overt act in furtherance of the conspiracy," *United States v. Dempsey*, 806 F.2d 766, 769 (7th Cir. 1986). Here, although the time period in which the alleged conspiracy operated spans at least two decades, the indictment meets this standard.

Furthermore, Count I is not duplicitous; it charges a single conspiracy. See *United States v. Bruun*, 809 F.2d 397, 406 (7th Cir. 1987). "If the alleged conspirators joined together to further a single design or purpose, then there is a single conspiracy." *United States v. Bullis*, 77 F.3d 1553, 1560 (7th Cir. 1996). Here, Count I charges just that–that defendants conspired with each other knowingly and intentionally to possess with intent to distribute or to distribute narcotics. See *United States v. Durman*, 30 F.3d 803, 809-10 (7th Cir. 1994). Defendant's argument that the government is alleging multiple conspiracies is, more appropriately, relevant to the evidence presented at trial. If such evidence "could tend to prove the existence of several distinct conspiracies," a jury instruction regarding the law of multiple conspiracies will be appropriate. Defendant can seek such an instruction at that time. *United States v. Mims*, 92

F.3d 461, 467 (7th Cir. 1996). Defendant's motion is denied.

MOTION FOR BILL OF PARTICULARS

Defendant Shell moves for a Bill of Particulars to clarify the charges in the indictment. It is within the district court's discretion to require a bill of particulars "to provide the defendant with the information necessary to prepare a defense." *United States v. Finley*, 705 F. Supp. 1272, 1277 (N.D. Ill. 1988). However, a defendant does not have constitutional right to know the "details of how [the government's case] will be proved." *United States v. Kendall*, 665 F.2d 126, 135 (7th Cir. 1981).

In the present case, defendant requests what the court views to be "evidentiary detail," rather than essential facts. For example, defendant seeks the identity of witnesses, the precise times and locations of events, and the precise manner of defendant's alleged acts. Furthermore, the government's argument that the post-indictment discovery information it has provided has given defendant the means to obtain much of this information is well-taken. See *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991). Defendant does not challenge this contention in any way. Thus, defendant's motion for a Bill of Particulars is denied.

MOTION FOR ANONYMOUS JURY

The government moves for an anonymous jury. Defendant Hoover objects on the basis that such anonymity presumes guilt rather than innocence and that it is essential to know where the potential jurors live and work to properly evaluate the venire.

It is within the discretion of the district court to require an anonymous jury. However, such a step should not be taken unless (1) there is "strong reason to believe the jury needs protection" and (2) reasonable precautions are taken to minimize the prejudicial effects of such a step on the defendant. *United States v. Crockett*, 979 F.2d 1204, 1215 (7th Cir. 1992). In the present case, circumstances warrant an anonymous jury: the government asserts that trial evidence will depict a pattern of violence by defendants that may cause jurors to fear for their safety; publicity is likely to continue surrounding this case; and defendants face substantial penalties in the event of conviction. See *Crockett*, 979 F.2d at 1216-17. Furthermore, as set forth by the government, the court can take a number of reasonable precautions to protect defendant from any resulting prejudice, id. at 1217.

Government's motion is granted.

MOTION TO SUPPRESS NON-TITLE III EVIDENCE

Defendant Shell moves for a suppression hearing to determine whether statements he made to law enforcement agents on October 15, 1994 were taken in violation of defendant's constitutional rights. Defendant argues that the statements should be suppressed because (1) the statements were the product of an unlawful seizure, and (2) defendant was not apprised of his Miranda rights before the statements were made.

The facts surrounding the arrest of defendant Shell are unclear. In addition, the issuance of Miranda warnings is disputed. Therefore, a hearing is necessary to deter-

mine whether probable cause existed for the arrest and whether Miranda warnings were properly given to defendant or waived. Defendant's motion for a hearing is granted.

SANTIAGO PROFFER

The government's preview of its evidence convinces the court that it should conditionally admit the government's proffered coconspirator statements "subject to its later determination that, based on all of the evidence admitted at trial, the Government has proved by a preponderance of that evidence all three requisite foundational elements." *United States v. Cox*, 923 F.2d 519, 525 (7th Cir. 1991). Defendants Shell and Bradd object. Shell objects to the fact that the government has presented "categories" of coconspirator statements rather than each specific statement that will be offered at trial. However, the categories and examples presented provide a sufficient basis for the court's preliminary determination to admit coconspirator statements.

Defendant Shell further objects to the government's references to convictions and "uncharged murders" in the *Santiago* proffer. The government does not appear to offer such evidence as "coconspirator statements"; objections to their admissibility would more properly be made via a motion in limine. Next, defendant Shell objects to a "list" which is proffered by the government as a coconspirator statement. The court finds that, as a preliminary matter, the "list" is conditionally admissible along with the other coconspirator statements, subject to the government laying a proper foundation at trial. Finally, defendant Shell argues that coconspirator statements made when particular defendants were legally

incapable of joining the conspiracy (because they were not yet born or were still children) should be excluded as to those defendants. The court rejects this argument; *United States v. Escelon*, 842 F. Supp. 1519 (E.D.N.Y. 1994), relied on by defendant, is completely inapposite.

Defendant Bradd argues that the *Santiago* proffer fails to present sufficient evidence that he was a member of the alleged conspiracy; thus coconspirator statements should not be admissible against him. However, evidence that the government avers it will produce at trial convinces the court to allow conditional admissibility of the statements as to defendant Bradd as well. See *United States v. McCarroll*, 1996 WL 99697, * 2 (N.D. Ill.).

Defendant's objections to the co-conspirator statements are denied without prejudice. Defendants can renew objections when coconspirator statements are again presented to the court.

MOTION TO SEVER

Defendant Bradd moves to sever. From the face of the indictment, it appears that Bradd was properly joined under Fed. Rule Crim. Proc. 8. However, Bradd claims that his motion should be granted pursuant to Fed. Rule Crim Proc. 14 because he will be prejudiced by evidence admissible against his co-defendants but not against him. Bradd's basis is his contention that the factual predicate necessary to admit coconspirator statements against him is missing.

The court has conditionally admitted such co-conspirator statements subject to the government's presentation of evidence at trial. If it turns out that co-conspirator statements are admissible against Bradd's co-defendants

but not against him, the court believes that limiting instructions at that time will sufficiently prevent any prejudice to Bradd. Particularly in cases of conspiracy, "deference should be given to the strong public interest in having people jointly indicted tried together." *United States v. Williams*, 858 F.2d 1218, 1223 (7th Cir. 1988).

Defendant's motion to sever is denied.

MOTION TO SUPPRESS TITLE III EVIDENCE

Defendants Shell and Bradd submit motions to suppress the government's Title III evidence.

JURISDICTION—VIENNA INTERCEPTS

Defendant Bradd moves to suppress on the ground that the issuing judge lacked jurisdiction to issue the Vienna interception order since it only granted authority to "intercept" oral communications outside the Northern District of Illinois. 18 U.S.C. § 2518(3) allows a judge to authorize interceptions "within the jurisdiction in which the judge is sitting." "Interception" as used by the statute encompasses both the redirection of communications and the initial hearing of the communication. *United States v. Rodriguez*, 986 F.2d 130, 136 (2d Cir. 1992). Thus, a federal court sitting in the jurisdiction where the "to be tapped" communication is located has authority to issue an interception order as does a federal court sitting in the jurisdiction where the communications are first heard. *Id.* Thus, if the government first heard the communications in Chicago, the issuing judge had jurisdiction to issue the order.

Defendant contends, however, that the government has not sufficiently demonstrated that the conversations

were, in fact, first heard in Chicago. AUSA Tibbett's affidavit states that the conversations were monitored in Chicago but Bradd contends that there were agents present in Vienna to whom the communications could have been broadcast via a receiver that was located there. This appears to be a factual dispute that should be resolved in a hearing. The court therefore orders a hearing as to this issue.

Furthermore, defendant Bradd requests an inspection of the electronic surveillance equipment to determine whether it does, in fact, have "broadcast" capabilities. Whether or not it does is inconsequential if those capabilities were not used in Vienna. Therefore, prior to ruling on the motion for inspection, the court will need to flesh out the facts regarding where the communications were first heard by human ears.

Defendants also attack the application for the Vienna order as facially insufficient because it fails to sufficiently describe the location of the interception. However, an application need only describe "the nature and location of the facilities from which or the place where the communication is to be intercepted." § 2518(1)(b)(ii) (emphasis added). The court finds that the government's description of the location is sufficient to meet this standard. See *United States v. Tavarez*, 40 F.3d 1136, 1139 (10th Cir. 1994).

SEALING—VIENNA INTERCEPTS

Bradd also argues that the Vienna intercepts should be suppressed because the government failed to immediately seal the tapes pursuant to 18 U.S.C. § 2518(8)(a). The government concedes that the tapes remained un-

sealed for 32 days following the expiration of the first extension of the Vienna order.

Although it is true that the extension of an order tolls the sealing requirement even if there are brief gaps in time between the extinguishment of the previous order and the granting of the extension, a more excessive delay without a sealing must be explained satisfactorily. If the government can establish that there was "good cause" for the delay, the evidence will not be suppressed. *United States v. Plescia*, 48 F.3d 1452, 1463 (7th Cir. 1995).

The government contends that it has presented good cause: Approximately two weeks into the first extension period, the microphone hidden in the Vienna visitors' passes was discovered. Safer Aff. at 2. The government set wheels in motion with the DEA to have a more discreet and equally effective microphone prepared and believed that it would be completed quickly. The government wanted the original tapes for comparison purposes in developing the second device and since they did not think they were required to seal the tapes given the imminency of the second extension, they did not do so. Safer Aff. at 2. After the development of the new microphone was continually delayed, the government, concerned that too much time was passing, submitted the tapes for sealing. A few months later, once the microphone was eventually prepared, they finally obtained another order for interception at Vienna.

The court finds that the government has presented good cause for their delay given the unique combination of factors present here. It appears that the government was mistaken as to the rapidity with which a more discreet form of listening device could be developed. They mistakenly expected an impending extension within

what they believed to be a sufficient time to avoid triggering the sealing requirement. Furthermore, the government believed that the law allowed them a "reasonable time" within which to get the extension without triggering the sealing requirement. This view of the law was objectively reasonable given its somewhat unsettled status within the Seventh Circuit. Thus the court finds that the government has presented good cause for its delay.

MINIMIZATION

Defendants Bradd and Shell argue that the government has failed to properly minimize intercepted communications. Because of factual disputes relating to the minimization of these calls, the court orders a suppression hearing.

NECESSITY

Defendant Shell contends that each of the affidavits in this case contained material omissions as to the necessity of electronic surveillance. The court finds sufficient factual disputes to warrant a suppression hearing on the issues.

Defendant further argues that the Parks and Johnson affidavits contain a material misrepresentation regarding necessity and asks for a *Franks* hearing on the issue. To secure a *Franks* hearing, a defendant must make a substantial and preliminary showing that the application contains a material, knowing or recklessly made false statement. *Franks v. Delaware*, 438 U.S. 154 (1978). Defendant here has failed to demonstrate that, in fact, a misrepresentation has been made. Defendants

contend that the statement that there was "no access to Darryl Johnson" was a material misrepresentation since there were instances where informants had contact with defendant Johnson. However, "access" may mean much more than simple contact and defendant has not demonstrated in any way that the statement was material to the issuing judge's determination of necessity. The request for a *Franks* hearing is denied.

PROBABLE CAUSE—SHRIMP ON THE NINE ("SHRIMP") INTERCEPTS

Defendant Shell contends that the Shrimp affidavits lacked probable cause. As to the initial Shrimp affidavit, he argues that there was an insufficient showing of reliability regarding the confidential informants used. As to the three subsequent extensions, he argues that there was an insufficient basis to warrant a finding of probable cause for continued surveillance.

Our review of the issuing judge's determination of probable cause is limited to whether there was a "substantial basis" for the finding. *United States v. Costello*, 610 F. Supp. 1450, 1456 (N.D. Ill. 1985), *aff'd* 830 F.2d 195 (1987), *cert. den.* 484 U.S. 1010 (1988). Where a probable cause finding is based partially on information provided by informants, the issuing judge must make a "practical and commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis for knowledge' of persons supplying information," there is probable cause for the electronic surveillance. *United States v. Zambrana*, 841 F.2d 1320, 1332 (7th Cir. 1988). Even though not every fact provided by an informant is fully supported, "such concerns are not per se grounds for disregarding

the information, but are merely relevant considerations in assessing the totality of the circumstances." *United States v. Leisure*, 844 F.2d 1347, 1355 (8th Cir. 1987).

The court agrees that there is not a strong showing of reliability for every confidential informant discussed in the Shrimp affidavit. For example, the government does not aver that any of the informants have been successfully used in other investigations. Nevertheless, other indicia of an informant's reliability or basis for knowledge may factor into the issuing court's determination. Here, some of the informants' information was corroborated by tape recorded conversations or police investigation. Furthermore, some of the informants were acting against their penal interests. Finally, much of their knowledge appears to be based on first-hand observation. See *Costello*, 610 F. Supp. at 1459-60. More importantly, the government has set forth considerable information gleaned from sources other than confidential informants to support its affidavit, particularly intercepted conversations, telephone records, and physical surveillance evidence. Considering the totality of the circumstances, the issuing judge had a substantial basis for his determination.

As to the three Shrimp extensions, the affidavits describe at length pertinent information derived from conversations intercepted pursuant to the previous Shrimp orders. The government contends that these conversations demonstrate drug transactions and other illegal activity emanating from Shrimp on the 9. This information provides a substantial basis for the issuing court's finding of probable cause. See *United States v. Mancari*, 663 F. Supp. 1343, 1355-56 (N.D. Ill. 1987).

JOHNSON "ROVING" INTERCEPT

Shell contends that 18 U.S.C. 2518(11), which allows for a "roving surveillance order," is unconstitutional and that, even if it is constitutional, the government has failed to meet the statutory requirements in this case. However, defendant Shell fails to demonstrate that he has standing to attack the legality of these interceptions because he fails to indicate that he was a party to any conversations intercepted by this roving surveillance or that the surveillance is otherwise directed at him. *United States v. Civella*, 648 F.2d 1167, 1171-72 (8th Cir. 1981).

PROBABLE CAUSE—VIENNA AFFIDAVITS

Defendant Bradd argues that the government failed to present probable cause for the Vienna intercepts as to him individually. However, the government has no obligation to demonstrate "probable cause" in reference to particular individuals named as interceptees in their application. *United States v. Marcy*, 777 F. Supp. 1400, 1402 (N.D. Ill. 1991) (citing *United States v. Martin*, 599 F.2d 880, 884-85 (9th Cir. 1979). As a result, defendant's requests to suppress the Vienna intercepts as to him and to hold a *Franks* hearing are denied.

CONCLUSION

In conclusion: Defendant Hoover's Motion to Dismiss the Indictment or Change Venue is denied; defendant Shell's Motion to Dismiss Count I is denied; Defendant Shell's Motion for a Bill of Particulars is denied; the government's Motion for an Anonymous Jury is granted; defendant Shell's Motion to Suppress Unlawfully Inter-

cepted Communications is granted in part and denied in part; defendant Bradd's Motion to Suppress Evidence is granted in part and denied in part. Hearings are ordered as specified in the ruling.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Harry D. Leinenweber
United States District Judge

DATED: December 12, 1996

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 14, 2001

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 98-2600, 98-2820,
98-2915, 98-3433, v.
98-3840, 99-1377,
99-2142 & 00-2520

LARRY HOOVER, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 CR 508—Harry D. Leinenweber, *Judge*.

Order

Defendants-appellants filed a petition for rehearing and rehearing en banc on April 26, 2001. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

HOOVER'S REFUSED CCE INSTRUCTION

To sustain the charge of engaging in a continuing criminal enterprise, the government must prove the following proposition with respect to the defendant you are considering:

First, that the defendant you are considering committed at least three violations of the federal narcotics offenses alleged in Count(s) _____ of the indictment. You must unanimously agree on which three acts constituted series of violations.

Second, that the defendant you are considering committed the offenses acting in concert with five or more other persons. You must unanimously agree on the five persons with whom the defendant committed the violations.

Third, that the defendant you are considering acted as an organizer, supervisor or manager of five or more persons; and Fourth, the defendant you are considering obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proven beyond a reasonable doubt with respect to the defendant you are considering, then you should find him guilty of Count _____.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proven beyond a reasonable doubt with respect to the defendant that you are considering, reasonable doubt with respect to the defend then you should find him not guilty of Count _____.

HOOVER INSTRUCTION NO. 15

United States v. Baker, 10 F.3d 1374, 1408 (9th Cir. 1993)

United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988)